IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2010-004-10228
[2013] NZHC 1246

THE QUEEN

v

PAUL WINSTONE FORSYTH
RICHARD GILBERT BETTLE
VANCE ERIC ARKINSTALL

Hearing: 23 May 2013

Counsel B Dickey for Crown
T J Castle for R G Bettle and V E Arkinstall
M Corlett for P W Forsyth

Judgment: 29 May 2013

JUDGMENT OF KATZ J
[Adjournment application]

This judgment was delivered by me on 29 May 2013at 2:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors:
Crown Solicitor, Auckland
Anderson Creagh Lai, Auckland
Breaden McCardle Chubb, Paraparaumu

Introduction

[1] Dominion Finance Group Limited ("Dominion Finance") and its related company North South Finance Ltd ("North South") were finance companies that raised funds for investment from members of the public. Paul Forsyth was a director of those companies. Three years ago, on 3 June 2010, Mr Forsyth and his co-directors were charged with seven offences under s 58 the Securities Act 1978. In particular it is alleged that during 2007 and 2008 they signed prospectuses and distributed advertisements relating to both companies that included untrue statements. The charges carry a maximum term of imprisonment of five years.

[2] One of the six directors has since died and two others have pleaded guilty. The charges against the remaining three (Messrs Forsyth, Bettle, and Arkinstall) are scheduled for a six week trial, commencing 17 June 2013.

[3] Mr Forsyth was represented by the law firm Gilbert Walker between July 2010 and February 2013. Gilbert Walker was given leave to withdraw in February 2013, as QBE Insurance would not confirm insurance cover and Mr Forsyth was unable to meet Gilbert Walker's ongoing legal fees out of his own resources.

[4] Following Gilbert Walker's withdrawal, Mr Forsyth engaged two barristers to act for him. They undertook some work on Mr Forsyth's behalf during February and March 2013. This included advising Mr Forsyth in relation to evidence he gave for the Serious Fraud Office in proceedings brought by it against a director and the Chief Executive Officer of Dominion Finance and North South:[1]

[5] On 5 April 2013 Mr Forsyth was provided with the terms on which his then legal team would be willing to represent him at trial. Those terms required Mr Forsyth to provide his legal advisers with cleared funds of $150,000, with the final instalment due by 20 June 2013.

[6] This was significantly less than previous estimates of Mr Forsyth's likely defence costs. Mr Forsyth deposes, however, that despite his best efforts he has not

[1] *R v Whale & Ors* [2013] NZHC 731.

been able to raise that sum. He has provided detailed evidence of his financial position to support his claim that he has neither net liquid assets nor a sufficient income stream to be able to fully fund his defence at trial. Mr Forsyth's income is, however, significantly above the relevant legal aid threshold. He has accordingly been declined legal aid.

[7] Despite his difficulty in raising the required funds, Mr Forsyth deposes that he wishes to retain counsel to represent him at trial and does not feel he has the necessary expertise to conduct his own defence. Although Mr Forsyth appears to have some funds available, his evidence is that these are insufficient to engage counsel for the full duration of the trial.

[8] Mr Forsyth's evidence suggests that the only realistic prospect of him being able to fund full legal representation at trial would be if QBE were found liable to meet the directors' defence costs in related proceedings ("QBE proceedings"). The QBE proceedings have been brought be Messrs Bettle and Arkinstall. Mr Forsyth has recently sought to join them as a third plaintiff. There is no prospect, however, of the QBE proceedings being resolved prior to the current trial date. Mr Forsyth submitted that, in such circumstances, it is premature for him to have to proceed to trial on a self-represented basis.

[9] The issue I must decide is whether it is in the interests of justice to adjourn Mr Forsyth's trial given the various matters I have outlined above. In particular, is there a reasonable prospect that Mr Forsyth can still receive a fair trial if an adjournment is not granted and he proceeds to trial on a self-represented basis?

The right to legal assistance and the right to a fair trial

Supreme Court decision - Condon v R[2]

[10] The leading authority on the right to a fair trial in the context of self-represented defendants is the Supreme Court decision in *Condon v R*. The Court accepted that Mr Condon had been "unwillingly" self-represented at trial. His

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[2] *Condon v R* [2007] 1 NZLR 300; (2006) 22 CRNZ 755 (SC).

counsel had withdrawn the day before the hearing. Mr Condon did not try to get alternative counsel appointed on legal aid and the Court had not suggested he do so. Instead Mr Condon represented himself, incompetently. He was convicted. The Supreme Court allowed his appeal against conviction on the basis that he had not had a fair trial.

[11] The Court reviewed the jurisprudence from overseas and then considered the position with reference to the provisions of the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). The Court noted that s 25(a) of the Bill of Rights guarantees to every person charged with an offence the right to a fair hearing. Further, such a person also has the rights under s 24(c), (d) and (f) to consult and instruct a lawyer, to adequate time and facilities to prepare a defence, and to receive legal assistance without cost, if the interests of justice so require and the person does not have sufficient means to provide for that assistance. The Court noted that the provisions of the Legal Services Act 2000 pertaining to criminal matters are the means chosen by Parliament to fulfill the Crown's obligation under s 24(f).[3]

[12] The Court observed that:

> [76]…Section 24 does not guarantee the provision of a lawyer for the defence in all cases, even when the charge being faced by the accused is of a serious crime. An accused has the right to employ a lawyer, but the State does not guarantee to provide the lawyer's services - in this respect its role is passive, in the sense that it must not impede the exercise of the right by the accused. The exception is under s 24(f) when the accused does not have sufficient means to provide for legal assistance. Even in such a case, however, it is the accused who must take the necessary steps to obtain assistance under the Legal Services Act.
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> [77] In contrast, the right to a fair trial, affirmed by s 25(a), is an absolute right. If , because the accused had no lawyer or for any other reason, the trial is fundamentally flawed, the accused will not have had a fair trial and the conviction must be quashed.

[13] The Court then went on to say:

> [79] So the appropriate question in a case like the present is whether the accused's lack of the proper opportunity to have legal representation made or contributed to making the trial, looked at as a whole, unfair so that there has been a substantial miscarriage of justice. In our view, the High Court of Australia in *Dietrich* was right to conclude that in the great majority of

[3] At [66].

> cases, that is, other than in exceptional circumstances, an accused who conducts his or her own defence to a serious charge, without having declined or failed to exercise the right to legal representation, will not have had a fair trial. That is the reason why s 30 of the Sentencing Act exists, with its policy of ensuring that those facing imprisonment if convicted are afforded the opportunity of being represented by a lawyer. Where, in the absence of waiver or forfeiture as explicitly contemplated by Parliament in subs (2) and (4) of s 30 of the Sentencing Act, legal counsel was not available at trial there will have been a breach of one or more of the subsidiary rights in s 24 of the Bill of rights and prima facie an unfair trial will have resulted from that breach. The conviction will then be quashed unless the Crown is able to satisfy the appeal Court that the trial was actually fair in terms of s 25(a). The conclusion that the trial was fair is not one to which a court will easily be drawn.

[14] The Court considered the position of a deliberately self-represented accused at [80]. Such a trial is not "presumed" to be unfair. However, the appellate Court is still obliged to examine the overall fairness of the trial. If the Court considers that the trial was unfair, any resulting conviction will be quashed. In undertaking this exercise the Court will need to "carefully consider what occurred at the trial and during the earlier period when the accused was preparing to conduct the defence".[4] The Court concluded that:[5]

> … in some circumstances the manner in which the accused through his or her own choice or conduct came to be unrepresented may be relevant to the assessment of fairness. It is unnecessary to say more about that in the present case.

[15] To summarise:

(a) Although there is no absolute right to legal assistance or representation in criminal cases, the fair trial rights enshrined in s 25(a) of the Bill of Rights Act are absolute.

(b) Where an accused is "unwillingly" self-represented (in other words, he or she has not waived or forfeited his or her right to legal representation) the trial is presumed to be unfair. On appeal against conviction the onus will be on the Crown to satisfy the appellate Court that the trial was, in fact, fair. This is a high threshold.

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4 At [81].
5 At [80].

(c) On the other hand, if the accused was "willingly" self-represented there will be no presumption of unfairness. Nevertheless an appellate Court will need to carefully consider all of the relevant facts to determine whether, in the particular circumstances, the right to a fair trial was compromised.

(d) Any conviction entered after a trial which was unfair (regardless of whether an accused was "willingly" or "unwillingly" self-represented) may, and probably will, be set aside.

Is Mr Forsyth "willingly" or "unwillingly" self-represented?

[16] The Crown submitted that Mr Forsyth was, in effect, a "willingly" self-represented accused. In particular, the Crown submitted that Mr Forsyth's disclosed income is sufficient for him to retain legal counsel for the trial, or that he could borrow the necessary funds against his future income. The Crown submitted that "if Mr Forsyth is ineligible [for legal aid] then the Crown's obligation is discharged" and that "the Court should not be concerned about whether Mr Forsyth believes he can afford legal representation". The Crown noted that one of the examples given by the Supreme Court in *Condon* of circumstances in which an accused can be said to be deliberately self-represented is where they have "been rightly refused legal aid".

[17] The Crown also submitted that Mr Forsyth could make efforts to retain "cheaper" lawyers or that he could have done more to secure legal representation for the trial. It was noted that Mr Forsyth does have some funds available, but that he has elected to spend those funds on the QBE proceedings (being brought by Messrs Bettle and Arkinstall) which he is seeking to join, rather than the criminal proceedings.

[18] Mr Forsyth strenuously disputes any suggestion that he is willingly self-represented. His evidence is that he wants to retain counsel but simply cannot afford to do so. He has no wish to represent himself at trial and does not believe that he has the necessary skill and expertise to do so competently.

[19] It is clear that, in determining whether the trial was unfair, an appellate court may take into account how a self-represented defendant came to be without counsel.[6] However, this is an adjournment application. In my view it is not necessary, for present purposes, to reach a definitive view as to whether Mr Forsyth is "willingly" or "unwillingly" self-represented. It is clear from *Condon* that, in either case, fair trial rights may be undermined or compromised. In my view the appropriate course at this stage is to err in Mr Forsyth's favour and assume that he is "unwillingly" represented. Taking that into consideration, together with all other relevant factors, is there a realistic prospect of Mr Forsyth having a fair trial?

Factors relevant to determining whether a fair trial is possible if Mr Forsyth is self-represented

[20] The options for the future of this case as it involves Mr Forsyth are that:

(a) The proceedings could be adjourned until the outcome of the QBE proceedings is known. In that event:

   (i) if QBE is required to meet the relevant defence costs a new trial date for Mr Forsyth could be set; or

   (ii) if QBE is not required to meet the relevant defence costs counsel for Mr Forsyth has foreshadowed the possibility of a permanent stay application.

(b) The matter could proceed to trial now which, on Mr Corlett's current instructions, would result in Mr Forsyth representing himself.

[21] If there is a reasonable prospect of Mr Forsyth receiving a fair trial at this stage, then proceeding to trial on 17 June 2013 (or shortly afterwards) would be the preferable course. Further delay would be undesirable, given that the relevant events occurred up to six years ago. Further, there would be obvious duplication and inefficiency in having two separate trials in relation to largely identical issues,

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6 *Condon v R* at [81]; *Misiuk v R* [2011] NZCA 663 at [32]; *R v Redhead* [2009] NZCA 497 at [35].

namely whether the relevant prospectuses and advertisements contained untrue statements.

[22] The likelihood of Mr Forsyth receiving a fair trial if he is self-represented is, however, the critical issue. If there are serious doubts regarding this, then his adjournment application should be granted. The "absolute" right to a fair trial must prevail over concerns regarding expense, delay or inefficiency.

[23] The Supreme Court in *R v Condon* indicated that a trial would be unfair where "the defence could not, in the particular case, have been adequately conducted without the assistance of counsel".[7] With the exception of the *Petricevic*[8] case (which also involved a pre-trial adjournment application) the relevant authorities are mostly at appellate level. They accordingly take a "post trial" perspective on whether the defence was adequately conducted without the assistance of counsel. It is clear from these authorities that trials involving self-represented persons will not necessarily be unfair. Indeed in a number of cases appellate Courts have found that the right to a fair trial has not been compromised by the lack of legal representation. Each case will necessarily turn on its own facts.

[24] Some of the factors which have been found to be relevant to the fairness of the trial process in previous cases have included:

(a) The manner in which the accused came to be unrepresented.[9] (As noted above, I will assume for the purposes of this application that Mr Forsyth is "unwillingly" self-represented.)

(b) The complexity of the factual and legal issues. Although legal assistance may not make any significant difference in some cases, in a case where there are matters of some complexity or difficulty, the absence of advice and representation may be decisive.[10]

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7 At [80].

8 *R v Petricevic* HC Auckland CRI-2008-004-029179, 12 July 2011 per Venning J.

9 *Condon v R* at [81].

10 *Smith v R* HC Invercargill AP28/93, 25 November 1993 per Williamson J; see also *R v Hill* [2004] 2 NZLR 145 at [79]; cf *R v McKinnon* CA240/04, 4 May 2005 at [48]).

(c) The seriousness of the charges and the likely penalty if convicted.[11]

(d) The personal characteristics of the accused including his experience and knowledge of the issues in the case[12] as well as his verbal skills and intellectual capacity.[13] This is likely to be relevant to the effectiveness of the accused in conveying the defence theory of the case.

(e) The amount of work done prior to withdrawal of counsel and whether the accused had the benefit of legal advice in the pre-trial stages of the proceedings. Appellate courts will "carefully consider what occurred at the trial and during the earlier period when the accused was preparing to conduct the defence".[14]

(f) The manner in which the Judge presided over the trial, including whether the Judge explained the Court procedures and trial processes to the accused.[15] Where the accused is self-represented the trial Judge will have special responsibilities and must of course meet them.[16] There is a heavy burden on the Judge to ensure that a self-represented accused receives a fair trial.[17]

(g) Whether the trial is a Judge alone trial or a jury trial. The latter gives rise to the danger of an unrepresented accused making a poor impression upon a jury or running the risk of allowing inadmissible and prejudicial evidence to come before a jury.[18]

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11 *Condon v R* at [73].

12 See for example *R v Petricevic* HC Auckland CRI-2008-004-29179, 12 July 2011 at [51] - [53].

13 In *Misiuk v R* it was noted that Mr Misiuk had the necessary intellectual capacity and verbal skills to conduct his case. The trial Judge referred to him as "a man of exceptional intelligence."

14 *Condon v R a*t [81].

15 *Condon v R* at [82]; the assistance of the Court was also noted in *Misuik v R.*

16 *R v McFarland* [2007] NZCA 449 at [56] and *R v Cumming* [2006] 2 NZLR 597 (CA) at [51]-[52].

17 *R v Redhead* at [35]; see also *Condon v R* at [80]-[82].

18 *R v Petricevic* at [50].

(h) Whether the trial involved legally represented co-accused, particularly where there is a common defence or some commonality of interest between co-defendants.[19]

(i) The appointment of an amicus to assist a self-represented accused and the role played by that person.[20]

Discussion

[25] It is not possible to determine in advance if Mr Forsyth *will* have a fair trial if he is self represented. Ultimately that issue can only be determined by an appellate court, in the event that Mr Forsyth was convicted and appealed his conviction on the basis that his trial was unfair.

[26] It is, however, possible to review the factors identified as relevant in previous cases (as outlined at [23] above) and form a view as to whether there is a reasonable prospect that Mr Forsyth will be able to adequately conduct his defence without the assistance of counsel. If there is, the trial should proceed. If there is not, the adjournment application should be granted.

Complexity of the issues, seriousness of the charges, and Mr Forsyth's personal attributes

[27] The charges Mr Forsyth faces are relatively serious, being punishable by a maximum term of five years imprisonment. The Crown acknowledges that the factual and legal issues are complex, albeit it says that this case is less complex than a number of the other finance company cases. In particular, the indictment includes only seven charges and the Crown's witness statements are apparently included in one Eastlight folder.

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19 In *R v Petricevic* the Court noted at [34] that if it was necessary for the defence to present expert accounting evidence it was "almost inevitable" that one of the other accused, who were represented, would do so.

20 In *Misiuk v R* the Court of Appeal found that Mr Misiuk had been given considerable assistance. An amicus was also appointed in *R v Redhead* . The Supreme Court in Condon (at [22]) noted that in assessing the fairness of the trial of an unrepresented accused, regard must be had to whether the accused had the benefit of guidance from a lawyer or an amicus at any time prior to or during the trial.

[28] It is also relevant that Mr Forsyth is a chartered accountant with his own accountancy and consulting practice. The facts relating to Mr Forsyth's involvement in the companies will need to be established at trial. For present purposes however the following matters are potentially relevant and do not appear to be controversial. Mr Forsyth appears to have been an executive director of Dominion Finance and North South, in the sense that he was employed by and involved in the day to day operation of those companies. He worked for the companies at their premises in Parnell for four mornings each week. Mr Forsyth was also apparently on the Audit and Risk Committee of both companies. The function of those committees was to deal with the companies' auditors and to manage areas of risk. I understand Mr Forsyth was also on the Credit Committee of both companies. Those committees considered applications by borrowers for loan finance.

[29] Although this would be a relatively complex case for many non-lawyers, Mr Forsyth's unique background, skills and experience mean that he will be better qualified than most to deal with the factual issues likely to arise at trial. Mr Forsyth's personal knowledge of the companies' affairs, combined with his experience as a chartered accountant, should aid Mr Forsyth in both understanding and countering the Crown case. Given his involvement with both companies, Mr Forsyth will presumably have a significant degree of familiarity with many of the key documents. Indeed a number of the charges relate to prospectuses which he allegedly signed.

[30] The Crown indicated that the key focus at trial will be on the companies' liquidity during the relevant period and also its involvement in related party transactions. It appears that Mr Forsyth's evidence in the recent SFO proceedings referred to at [4] above addressed the latter of these issues extensively, and also the former to some extent.

[31] I do not suggest that presenting the defence case will not be a daunting prospect for Mr Forsyth. Hopefully, however, Mr Forsyth's previous role within the companies, and skills as a chartered accountant, will render the prospect somewhat less daunting than it might otherwise have been.

The extent to which Mr Forsyth had the benefit of legal advice in the pre-trial stages of the proceedings

[32] Mr Forsyth has been legally represented for the last three years. The Crown submitted that, during that period, he will have been in receipt of extensive "high quality" legal advice. Further, Mr Forsyth received legal advice in relation to the evidence he gave in the recent SFO proceedings (during which his counsel attended Court on a "watching brief" basis). His evidence in the SFO proceedings is likely to overlap extensively with any evidence he may choose to give in these proceedings. The Crown submitted that, given this background, Mr Forsyth is likely to be relatively well placed in terms of his preparation for trial.

[33] In my view there is some force in that submission, although I do not overlook that if Mr Forsyth were to be legally represented at trial his counsel would likely be engaged in fairly intensive pre-trial preparation in the weeks leading up to trial, regardless of the extent of work undertaken previously.

[34] I note for completeness that Mr Forsyth's statement of financial position indicates an ongoing ability to retain his current legal advisers to provide some degree of assistance with pre-trial preparation, even if they are not able to participate fully in the trial itself.

Judge alone trial/the manner in which the Judge presides over the trial

[35] The trial will be a Judge alone trial. As noted in *Petricevic* there is therefore no danger of an unrepresented accused making a poor impression upon a jury or running the risk of allowing inadmissible and prejudicial evidence to come before a jury.[21]

[36] Obviously "the manner in which the Judge presides over the trial" will only be able to be judged with the benefit of hindsight. Fortunately, however, there is considerable appellate guidance as to best practice in trials involving self-represented litigants.

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[21] *R v Petricevic* at [50].

Whether the trial involves legally represented co-accused

[37] Mr Forsyth's co-accused, Messrs Bettle and Arkinstall, are legally represented. In practical terms this is likely to be of considerable assistance to Mr Forsyth.

[38] The allegations in the indictment are that all of the directors signed prospectuses or authorised advertisements which contained statements which were untrue. There is no prospect of the truth or falsity of the relevant statements being determined differently between the three directors at trial. If Messrs Bettle and Arkinstall are able to establish that the relevant statements were not "untrue", or that any untrue statements were "immaterial" then Mr Forsyth will benefit equally from such findings.

[39] I note however that there may be some differences of position between the directors in relation to whether the relevant director had reasonable grounds to believe, and did, up to the time of the distribution of the advertisement or prospectus, believe that the relevant statement was true. This is a defence under s 58(2).

Appointment of an amicus

[40] The Court has a discretionary power to appoint counsel to act as amicus curiae to assist the Court by advising or assisting a self-represented litigant. This can include presenting argument which such a person is unable (for whatever reason) to present for themselves. An amicus is most commonly appointed where an accused is not legally represented and the trial Judge has concerns that the lack of legal assistance may cause the trial to be unfair under the test set out in *Condon v R*. The Supreme Court in that case noted that in assessing the fairness of the trial of an unrepresented accused, regard must be had to whether the accused had the benefit of guidance from a lawyer or an amicus at any time prior to or during the trial.[22]

[41] An amicus does not "represent" a party to the proceedings in the traditional sense and accordingly does not owe duties to them. Nor is an amicus required to

[22] At [82].

follow the directions or instructions of the person whose interests they may be appointed to protect. Nevertheless, in criminal cases, counsel appointed as an amicus "may act in a partisan way, in the sense that he or she may present the arguments that a party would normally present".[23]

[42] In some cases where the accused is self-represented the accused's former counsel has been appointed as an amicus.[24] I raised this possibility with counsel in this case, but understand from a memorandum filed subsequently that both of Mr Forsyth's counsel have availability issues during the trial period. In addition counsel expressed some concerns about possible "role confusion".

[43] Nevertheless, in my view this is a case in which it would be appropriate to appoint an amicus. The charges are serious, punishable by a maximum period of five years imprisonment. The subject matter is relatively complex. As noted above, Mr Forsyth will be better placed than most lay litigants to deal with the factual issues in this case. However, he does not have a legal background and it is accordingly appropriate that an amicus be appointed to assist with legal and procedural aspects of the trial. I direct the appointment of an amicus accordingly.[25]

Conclusion

[44] It is obviously far from ideal that Mr Forsyth may not be legally represented at trial. However, taking all of the above matters into account I am not prepared to conclude that there is no reasonable prospect of Mr Forsyth having a fair trial if he is not legally represented. In my view there are good prospects in this case that the trial will be able to be conducted in a way that is fair to Mr Forsyth, despite his lack of legal representation. The circumstances are not such that an indefinite adjournment is required on the basis that a fair trial will not be possible. As noted above, however, an amicus will be appointed to assist Mr Forsyth. In addition the current trial commencement date of 17 June 2013 will be deferred for a week to provide Mr Forsyth with additional time to prepare his defence. The Crown has

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23 *R v McFarland* at [55]; *Solicitor-General v Miss Alice* [2007] 1 NZLR 655 at [17]-[18].

24 See *R v Lee* [2006] 3 NZLR 42 (CA); (2006) 22 CRNZ 568 at [111].

25 A separate Minute will be issued outlining the proposed role of the amicus and inviting suggestions from counsel as to suitable persons for the role, following which a formal appointment will be made.

previously indicated that, in order to assist Mr Forsyth, it would be willing to provide a written synopsis of its opening prior to trial. Other accommodations will be made during trial to reflect Mr Forsyth's self-represented status.

Result

[45] I order as follows:

(a) The adjournment application is declined.

(b) The Crown is to file and serve a written synopsis of its opening by **19 June 2013.**

(c) The trial will commence on **24 June 2013**.

(d) An amicus curiae will be appointed, on terms which will be set out in a separate Minute.

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Katz J